Kansas v. U.S. Dept. of Interior, ___ F. Supp. 3d ___, 2021 WL 1784557 (D. Kan. May 5, 2021)

- **Holding:** Secretary of the Interior did not abuse its discretion in (1) taking land into trust on behalf of the Wyandotte Nation as mandatory under Public Law 98-602 and (2) deeming the "settlement of a land claim" exception in Section 19 of the Indian Gaming Regulatory Act applicable to such land in reliance on prior precedent involving a different tract taken into trust for gaming purposes for the Nation pursuant to that public law.
- **Summary:** Public Law 98-603, 98 Stat. 3149 (1984), repealed a prior statute that distributed funds to satisfy a judgment of the Indian Claims Commission and the United States Court of Claims in favor of the Wyandotte Tribe of Oklahoma and, in its stead, provided for distribution of the settlement amount in the form of per capita payments to certain tribal members (80%) and a distribution to the Tribe (20%) of which "[a] sum of $100,000 ... shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe." *Id.* § 105(b)(1). The Tribe, now the Wyandotte Nation, invested the $100,000 in mortgage bonds and then merged those bonds into an investment account that included amounts from its general fund.

  The Nation purchased a parcel of land, known as the Shriner Tract, in 1996 for $180,000 and requested that the Secretary of the Interior take it into trust. This sum, as later explained by the district court, was derived from "funds drawn from the Wyandotte Nation's investment account, in the form of a margin account loan against the account that held, in part, investments purchased with the land-acquisition funds." The Secretary granted the request, a determination that led to extensive litigation and eventually a decision from the Tenth Circuit, *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001), which held that the trust acquisition was mandatory so long as made with § 105(b)(1) funds. On remand, the Secretary concluded that, according to an accountant's analysis of the investment account's principal, earnings and margin interest costs, the portion of the account attributable to the land-acquisition contribution was $212,170 as of the 1996 purchase's date. The Secretarial action was upheld on judicial review; i.e., the Nation could use the aggregate of principal and investment account amount attributable to the land-acquisition contribution to trigger application of a non-discretionary duty to accept the land into trust. *Governor of Kansas v. Norton*, 430 F. Supp. 2d 1204 (D. Kan. 2006). A later decision from the same district court judge held that the Shriner Tract acquisition qualified as a "settlement of a land claim" under 25 U.S.C. § 2719(b)(1)(A) and, therefore, qualified as after-acquired Indian land for IGRA gaming purposes. *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1208 (D. Kan. 2006) ("The plain meaning of 'land claim' does not limit such claim to one for the return of land, but rather, includes an assertion of an existing right to the land. ... [T]he word 'land' modifies the word 'claim,' not 'settlement,' and thus a 'land claim' means that the operative facts giving rise to a right arise from a dispute over land, not that the land claim be resolved by the return of land.").

  Before the Shriner Tract purchase, however, the Nation had bought a 10-acre piece of land known as the Park City Parcel. In 2008, it re-submitted a previously withdrawn application for that parcel to be taken int trust. The Secretary denied this request in 2014 "because the record at the time suggested that there were not sufficient land-acquisition funds (which included the principal $100,000 and any earnings or interest) to buy both it and the Shriner Tract." However, the Secretary left the door open for the Nation to submit

additional information to address that issue. It did so in 2017 with an accountant's report which concluded that "[a]t the beginning of the fiscal year in which the Park City Parcel was purchased, the land-acquisition funds had a balance of $173,647" and that "[e]ven accounting for the Park City Parcel purchase, at the beginning of the fiscal year in which the Shriner Tract was purchased, the land-acquisition funds had a balance of $187,950, which was enough to cover its $180,000 cost." Given these new data, the Secretary granted the land-into-trust application in 2020. The same decision also determined that the "land claim settlement" exception applied "'consistent with the Department's acquisition of the Shriner Tract as upheld by the court in 2006 *in Wyandotte Nation v. [T]he National Indian Gaming Commission*.'" The Secretary, in so deciding, did not consider regulations issued in 2008 that set forth criteria for applying that exception to the general rule that IGRA-sanctioned gaming can take place only on "Indian land" which existed as of the statute's 1988 effective date. *See* 25 C.F.R. § 292.5.

The district court upheld the Secretary's decision. As to the land-into-trust component, it first rejected as controlling 1996 statements by certain agency officials that no further trust land acquisitions could occur under the auspices of Public Law 98-602 after the Shriner Tract transaction. Although "the Court harbor[ed] some doubts that any such binding department policy was created based on the statements cited by Plaintiffs[,]" it found them not conclusive under Administrative Procedure Act judicial review standards:

> The arbitrary-and-capricious standard requires a rational and satisfactory explanation for a decision that is supported by substantial evidence. ... "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." ... All that's required is "a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by the prior policy."

Here, it quoted the requisite reasoned explanation from the 2014 Secretarial decision:

> "The State also contends that Department officials understood that only one acquisition was permitted by the Act when it approved the Shriner Tract acquisition in 1996....Not only does the Act not limit the number of acquisitions by its express terms, the statements the State identifies were made before the Department had the benefit of an accounting of the 602 Funds to know how much the 602 Funds had grown in value by July 1996."

This reasoning did not lose its force merely by virtue of the decision's denying the Nation's application because the denial "was made with the explicit caveat that the Wyandotte Nation could submit a new application if it could find additional records that would address the interest-related deductions." Thus, "there was no departure from policy in the May 2020 Decision—any such policy had already been rejected given its conflict with the statute and a change in facts and circumstances."

Nor was the court convinced that claimed use of earnings from the land-acquisition fund for the Park City purchase made a difference. This assertion, it reasoned, misstated the 2020 decision's analysis:

> The Secretary did not determine that the Park City Parcel was purchased with only the earnings on the land-acquisition funds or address whether that would be legally permissible. ... [T]he May 2020 Decision focused on whether there was sufficient value in the investments purchased with the land-acquisition funds to cover both

> the Shriner Tract and Park City Parcel if properly accounting for interest-related deductions.

In sum, Plaintiffs' principal-versus-earnings characterization was "simply not reflective of how either the Shriner Tract or the Park City Parcel was purchased. Both were purchased using margin account loans against the value of the investments, including interest and earnings, purchased with the land-acquisition funds." The court also rejected, on essentially the same basis, the contention that the Park City Parcle purchase was not made with land-acquisition funds.

The "land claim settlement" component of the Secretarial decision was affirmed in light of the earlier *Wyandotte Nation* decision:

> Given the unique history of this litigation, including the history of the Shriner Tract, the Court cannot conclude that [the Secretary's] reasoning is so irrational as to be arbitrary and capricious. The Secretary was considering the exact same funds considered in *Wyandotte Nation*. Indeed, had the Secretary ignored the *Wyandotte Nation* decision, it would likely face a challenge that the decision was arbitrary and capricious because it would have "entirely failed to consider an important aspect of the problem. *Wyandotte Nation*, and indeed the Shriner Tract litigation as a whole, is certainly directly relevant to the Park City Parcel's trust application and gaming eligibility as both pieces of land were bought with the same pot of money allocated under PL 602.

The court also gave cold shoulder to Plaintiffs' argument that, in failing to consider the 2008 regulation implemented to carry out the exception, the Secretary ran afoul of *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 947 (2005), which held that "[w]here a court 'tentatively resolves an ambiguity,' that resolution is authoritative until the agency offers a definitive interpretation." But here,

> [a]lthough the focus of the arguments was on the phrase "land claim," nothing in *Wyandotte Nation* suggests that the overall "settlement of a land claim" exception carried any ambiguity. Certainly, had that phrase been viewed as ambiguous at all, it's unlikely that it would have gone undiscussed. Rather, Judge Robinson concluded that "the plain language of section 2719(b)(1)(B)(i) does not preclude the land claim brought before the ICC in this case from falling within that exception." ... Given these considerations, the Court cannot conclude that the Secretary's reliance on *Wyandotte Nation* was arbitrary and capricious.

- **Relevant (2020) Deskbook Sections:** 2:15 n.4; 12:16 n.6